88-1645

Supreme Court, U.S.
FILED
MAR 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.....

IN THE SUPREME COURT OF THE
UNITED STATES

==========

MARCH TERM 1989

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WILFRED J. CRUZ, SR.,
Pro se Petitioner

Vs.

UNITED STATES DEPARTMENT OF LABOR,
Director - Office of
Workers' Compensation Programs,
Respondent

And

Holland & Lyons Restoration Co.,
Harford Mutual Insurance, Co.,
Party Respondents

==========

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT.

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Wilfred J. Cruz, Sr.
4638 Livingston Rd, SE,
Apartment 304
Washington, DC 20032
(202) 562-6941

QUESTIONS PRESENTED

I. Whether the Longshoremen's and Harbor Workers' Act is in violation of Article VII of the Amendment to the Constitution, in this District.

IA. Whether the Congress of the United States in passing Title 28 USC Chapter 17, "Resignation and Retirement of Justices and Judges", Section 372, "Retirement for Disability, Substitute Judge on Failure to Retire, Judicial Discipline", violated Article III, Sections I and II of the Constitution and consequently, violated my rights under the Constitution by not first repealing Article III and second by allowing a contradictory Law to exist simultaneously with the Constitutional requirement prohibiting such procedures, as in Article I, Section 8, which makes the procedure either "equal to", "superior than" or "outside of" the Jurisdictional Powers of the Supreme Court which in effect establishes Two Branches of Judicial Powers, one for Judges and one for the rest of the Country including the President who must be tried by the Supreme Courts',

"Chief Justice".

The above with regards to my "Complaint of Judicial Misconduct", Numbered 88-3, and follow-up thereon with respect to this case.

II. Whether the right to have witnesses in my favor were violated as per Article VI of the Constitution and Equal Protection XIV and Due Process XIV.

Whether the refusal to allow a witness in my favor is in violation of Article VI of the Amendment to the Constitution ,"To have compulsory process for obtaining witnesses in his favor".

IIA. Whether the United States Court of Appeals for the District of Columbia Circuit having been granted and knowingly accepting powers unconstitutionally by having jurisdictional powers which are <u>not</u> subject to the Supreme Courts' Review in violation of Article I, Section 8 makes their authority "equal to" or "greater than" that of the Supreme Court. This authority being granted to it by Title 28 USC Chapter 17, and which may violate my right of Due Process and Equal Protection under Law.

The above with regards to my "Complaint of Judicial Misconduct" Numbered 88-3 with follow-up thereon with respect to this case.

III. Whether my rights to Due Process of Law were violated as per [Article XIV] of the Constitution by the acceptance of the Court of a "no-show" witness's "unsigned" Deposition. [See Due Process and Equal Protection.

IV. Whether apparent, "Conflict of Interest", the Judge in my case and his wife both in the same District and actual "Conflict of Interest" and/or collusion, the same wife deciding whether further collusion existed in her husband's case, is violating my right to Equal Protection of Law XIV and of Due Process XIV as required under the Articles of the Constitution as evidenced by Case Number 88-3 of my Complaint of Judicial Misconduct and continuing follow-up thereof.

V. Whether a Firm, insured by a Mutual Insurance Company, owning shares of stock and voting rights in the Mutual Insurance Company, can present as a credible witness an employee of the Firm who also may

legally be an employee of the Insurance Company.

VI. Whether the United States Court of Appeals for the District of Columbia Circuit violated the Constitution by allowing less than a Three Judge Panel, possibly one Judge, to make a last minute change that could have aborted my case, in violation of not only Article XIV of the Amendment to the Constitution [Due Process and Equal Protection] but also in violation of their Own Court Rules.

VII. Whether Article VI and XIV of the United States Constitution was violated by introducing into the Court statements of injury prior to this case for which no Medical Records were presented since none exists.

VIII. Whether the United States Court of Appeals for the District of Columbia in allowing the Principal Respondent, the United States Department of Labor, to withdraw, changed the entire case from one of deciding questions concerning the Constitutionality of the Judge's Decision to one of re-playing the original case violated my right to Due Process and Equal

Protection under Article VI and XIV of the Amendment to the Constitution.

Also did the Department of Labor, by withdrawing, successfully hide infractions by the Insurance Company parties in their violating with impunity Reporting Requirements and other Rules of the Department of Labor which could involve questions of Constitutional violations under the named Articles.

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TABLE OF AUTHORITIES

CONSTITUTION:

U.S. Constitution Article(s) I, III, VI

U.S. Constitution Amendments:

Article(s) V, VI, VII, XIV

STATUTES:

28 U.S.C. subsection 1254(1)

33 U.S.C. subsection 901 et seq.

36 D.C. Code subsection 501 et seq.

RULE:

Rule 17, U.S. Supreme Court

Rule XIII(C) and Rule VII of the "Handbook of Practice and Internal Procedures - U.S. Court of Appeals for the District of Columbia Cir. August 1, 1987"

NO.....

IN THE SUPREME COURT OF THE
UNITED STATES

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MARCH TERM 1989

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WILFRED J. CRUZ, SR.,
Pro se Petitioner

Vs.

UNITED STATES DEPARTMENT OF LABOR,
Director - Office of
Workers' Compensation Programs,
Respondent

And

Holland & Lyons Restoration Co.,
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Party Respondents

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT.

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OPINIONS BELOW

1. Judgment U. S. Court of Appeals for

the District of Columbia Circuit, October 12, 1988 [See Appendix D, App. 7]

2. Denial of Rehearing, December 29, 1988 [See Appendix B, App. 3]

3. Denial of En Banc Rehearing, December 29, 1988 [See Appendix C, App. 5]

4. U. S. Department of Labor Benefits Review Board Decision and Order, September 30, 1987 [See Appendix E, App. 14]

5. US/DOL Administrative Law Judge Decision and Order - Denying Benefits, December 27, 1983 [See Appendix F, App. 21]

6. US/DOL Comissioner Finding in Favor of Wilfred J. Cruz, Sr., August 24, 1982 [See Records]

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STATEMENT OF JURISDICTION

The Judgment of the U. S. Court of Appeals for the District of Columbia Circuit was entered on October 12, 1988. A Petition for Rehearing was denied on December 29, 1988. This Court's Juridiction is invoked under Title 28, U.S.C. subsection 1254 (1), Rule 17(a) and (c) of the "Rules of the Supreme Court of the United States" and Rule XIII of the U.S. Court of Appeals for the District of Columbia Circuit in their

Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit", August 1, 1987.

==========

STATEMENT OF CASE

I sustained an injury to my back while on the job on June 22, 1979.

The Case was found in my favor at the US/DOL Commissioner level. [See Records of Department of Labor]

The US/DOL Commissioners Judgment was overturned by the US/DOL Administrative Law Judge, [See Appendix F, App. 21]

The US/DOL Benefits Review Board [See Appendix E] and the United States Court of Appeals for the District of Columbia Circuit [See Appendix E] with the Denial of Rehearing [See Appendix C] along with Extension of Time for Certiorari [See Apppendix A]

Federal questions were raised in Motions and inferred in the Brief in the United States Court of Appeals including the Complaint of Judicial Misconduct Numbered 88-3 and follow-ups thereon.

The Court of First Instance was due to this Case being a Workmen's Compensation Case under the Longshoremen's and Harbor Workers Act in the District of Columbia.

Having received no documents from either the Justice Department or the U.S. Court of Appeals for the District of Columbia Circuit, I can only assume that the U.S. Court of Appeals for the District of Columbia Circuit failed in its responsibility under law to satisfy the requirements of Title 28 U.S.C. subsection 2403(a).

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ARGUMENT

I. My case, having been found in my favor at the Commissioner level, involves a Private Contractor working on private property, insured by a private non-governmental owned insurance Firm and I being a private citizen. Making no payments until after approximately eighteen (18) months and continuing for approximately one (1) year, the Insurance Company stopped payments in violation of the Department of Labor Laws. The monies involved is greater than twenty dollars ($20); therefore, a trial by Jury was in order and the procedure of the Longshoremen's and Harbor Worker's Act is in violation of the VII Amendment to the Constitution in allowing a trial by a one man Administrative Law Judge, and for all practical purposes, in secrecy.

DOES A CITIZEN LOSE HIS RIGHT TO PROTECTION UNDER THE CONSTITUTION BY REASON OF HIS RESIDENCE AND/OR EMPLOYMENT IN THE DISTRICT OF COLUMBIA?

IA. Although Congress has the power to make Exceptions and Regulations as they may make, should they not first repeal

Article I, Section 8 along with Article III and state the expected exceptions, if possible, provided that the exceptions do not violate other parts of the Constitution? It is my belief that Repeal and Replacement is necessary to insure the rights of every citizen rather than to confer rights of "no-fault" and the titles of "unreviewables" upon Members of a supposedly Inferior Court who, according to the Preface of the U.S. Court of Appeals for the District of Columbia, are already legally entitled to make totally wrong decisions whenever it pleases them without fear of being asked the simple question on which their job may depend, "If you knew your decision was totally wrong, why did you violate the individuals right to a fair trial?" The only proper answer would be that "Senator DeConcini's Bill gives me that right which is not subject to Review by the Supreme court but goes straight to his committee".

Congress's right to make exceptions does not apply to making "standing" Laws or Rules and calling them Exceptions.

Should Title 28 USC Chapter 17, therefore

not be regarded as a "standing" Law rather than an exception as an exception in individual or unusual circumstances which may appear once for an individual or entity with accompanying regulations governing that particular circumstance.

II. It is my contention that the Honorable Judge Julius Johnson denied me my rights under the Constitution by refusing to allow a witness in my favor while at the same time allowing a witness in favor of the Insurance Company to appear, [See Transcript] and that his reason for such denial does not meet any Constitutionally authorized standard for his denying me my rights regardless of his written words stating that, "I am too protective of my rights", in his Decision.

[See DECISION Administrative Law Judge].

IIA. Although the question of Constitutionality has been raised in Question IA, here I am posing the question of Acquiesence on the part of the Inferior Courts in knowingly accepting powers which have all the appearances of being in violation of the Constitution.

The Constitution itself is no more than

about six (6) pages long and the word "exception" is clearly defined in Webster's Dictionary.

The constitution can be regarded as the Property of the American People.

Can the People of the United States have confidence in the Inferior Courts, Federal Districts and Federal Appeals should the Supreme Court decide that they are holding powers illegally and using these powers to pass judgement on themselves and that the so-called "United States Judicial conference" also being a Tribunal is also unconstitutional in this regard.

Since they also "must" be Inferior to the Supreme Court and its Review, without the repeal of Article I, Section 8, and Article III, an unconstitutional body has been created.

III. An "unsigned" Deposition was introduced into my case by the Insurance Company Lawyer. The person from whom this "unsigned" piece of paper was taken, supposedly, was on his "death-bed" and could not appear at the Court. This same "unsigned" Deposition that was supposedly non-existent at the time had been read to

me by my lawyer before the Hearing by the Administrative Law Judge. When I asked my lawyer to let me see it, his reply was "I'll read it to you". The part he read concerned a six (6) foot split entrance door which is not an item on the American Market for the average entrance door and which does nothing to describe the actual accident location and door which was about twenty (20) feet inside of the entrance and of a higher height and heavier weight. [See Records of Appeals Court].

It seems that this "unsigned" Deposition was taken again for the second time after the "miraculous" recovery of the author whose refusal to sign his own <u>voluntary statement</u> seems to give the impression that his "intention" was never to be liable for such statements. The only "fact" in the "unsigned" Deposition is the so-called authors admitting that he arbitrarily decided that he would not respond to the Department of Labor Request because "he decided" it was not necessary. [See Deposition].

Although Judge Julius Johnson wrote in his Decision that the author of the "unsigned"

Deposition "testified", he did not testify as he is not recorded as ever appearing before Judge Julius Johnson. [See Records].

IV. See Court Records, Motions and Letters including Case Number 88-3 and resulting courses of action.

V. The Author of the "unsigned" Deposition being in charge of Insurance Company Records for the Stockholder Firm and whose entire unsigned Deposition is hearsay and "after the fact" with wrong locations, size and purpose of door in question described, violate the XIV Amendment to the Constitution concerning my right to Due Process and Equal Protection of Law and Article VI of the Amendment to the Constitution, to be confronted with the witness against him, who is also an admitted violator of Federal Law according to his own "unsigned" Deposition.

Having a common tie in owning shares having voting rights and sharing in profits or losses in any manner make the purpose of cases arising out of any claims and any suit to seek payment from one affects the other. Therefore, in this context, they

must be considered as working toward their mutual financial benefit which would include one justifying the actions of the other.

One name should have appeared as the Respondent with the other as Stockholder, which could have thrown a different light on the entire case and on new insurance tactics in general.

Should the "Mutual" Insurance Companies, which I regard as the "twin" to the Savings and Loans Entities, be investing in the same companies they insure -- then collusion, corruption and deception may be involved even more.

VI. Question VI is self-explanatory. [See Court Rule VII of the "Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia", August 1, 1987 and specifically Rule VII(F) along with Court Orders by Judge Silberman and Court Procedures and Records.]

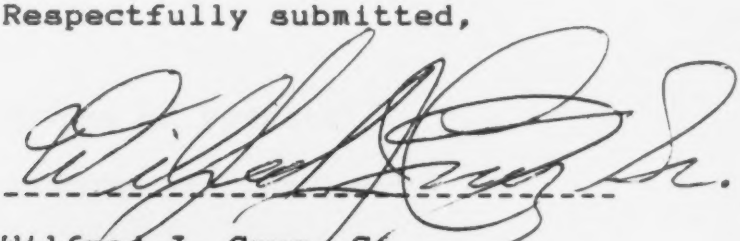
VII. Question VII is self-explanatory.

VIII. question VIII is self-explanatory. [See Court Records and Related Procedures]

CONCLUSION

For all of the above reasons, I, Pro se petitioner, Wilfred J. Cruz, Sr., respectfully request this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



Wilfred J. Cruz, Sr.
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

==========

No. 87-1724 September Term, 1988

Wilred J. Cruz, Sr.,

FILED MAR 22 1989

Petitioner CONSTANCE L. DUPRE

v. - CLERK

Director, Office of Workers' Compensation Programs, Holland & Lyons Restoration Company, and Harford Mutual Insurance Company,

Respondents

ORDER

Upon consideration of petitioner's Mandate and of the response thereto, it is

ORDERED that the Clerk is directed to withold issuance of the mandate of the Court through March 29, 1989.

No further stay of the mandate will be granted.

FOR THE COURT:

CONSTANCE L. DUPRE,

CLERK

/s/ Robert A. Bonner

Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

==========

No. 87-1724 September Term, 1988

Wilred J. Cruz, Sr.,

Petitioner FILED DEC 29 1988

v. CONSTANCE L. DUPRE

Director, Office of Workers' CLERK
Compensation Programs, Holland
& Lyons Restoration Company,
and Harford Mutual Insurance
Company,

Respondents

BEFORE: Edwards, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed November 17, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,

CLERK

/s/ Robert A. Bonner

Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

==========

No. 87-1724 September Term, 1988

Wilred J. Cruz, Sr.,

Petitioner FILED DEC 29 1988

v. CONSTANCE L. DUPRE

Director, Office of Workers' CLERK
Compensation Programs, Holland
& Lyons Restoration Company,
and Harford Mutual Insurance
Company,

Respondents

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Petitioner's Suggestion for Rehearing En Banc has been circulated to the full court. No member of the Court requested

the taking of a vote thereon.

Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,

CLERK

/s/ Robert A. Bonner

Deputy Clerk

Chief Judge Wald did not participate in this Order.

NOT TO BE PUBLISHED-SEE LOCAL RULE 11(c)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

==========

No. 87-1724 September Term, 1988

Wilfred J. Cruz, Sr., FILED OCT 12 1988

Petitioner CONSTANCE L. DUPRE

v. CLERK

Director, Office of Workers' Compensation Programs, Holland & Lyons Restoration Company, and Harford Mutual Insurance Company,

Respondents

ON PETITION FOR REVIEW FROM THE BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR

BEFORE: Edwards, Buckley and Sentelle, Circuit Judges

JUDGMENT

This case was considered on the record on the petition for review from the Benefits Review Board, United States Department of Labor, and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED that the petition petition for review of the Benefits Review Board order filed September 30, 1987, be denied.

The Clerk is directed to withold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Dir. Rule 15.

Per Curiam

MEMORANDUM

Petitioner Wilfred J. Cruz seeks review of a decision of the Benefits Review Board, United States Department of Labor. That decision affirmed an administrarive law judge's ("ALJ") order which denied Cruz's claim under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA")[1] for temporary total disability benefits from June 22, 1979 to June 13, 1981, and permanent partial disability benefits beginning June 14, 1981. We deny the petition for review.

Under the LHWCA, the Board is bound to regard the ALJ's findings of fact as conclusive if supported by substantial evidence on the record as a whole. 33 U.S.C. subsection 921 (b) (3). See Stevenson v. Linens of the Week, 688 F.2d 93, 96-97 (D.C. Cir. 1982). As a result, this court

must ascertain "(1) whether the Board adhered to the applicable scope of review, (2) whether the board committed any errors of law, and (3) whether the ALJ's findings are supported by substantial evidence on the record considered as a whole." Crum v. General Adjustment Bureau, 738 F.2d 474, 477 (D.C. Cir. 1984). See Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1049 (D.C. Cir. 1976).

Cruz contends that the ALJ erred in

1. 33 U.S.C. subsections 901-50. The LHWCA provided workers' compensation to individuals employed in the District of Columbia until July 1982. See D.C. Code Ann. subsection 36-501 (1973). See also Gustafson v. International Progressive Enterprises, 832 F.2d 637, 638 n.1 (D.C. Cir. 1987). Injuries incurred after that date are covered by the District of Columbia Workers' Compensation Act of 1979, D.C. Code subsections 36-301 - 36-345. Because Cruz's claim arose prior to the effective date of the Workers' Compensation Act of 1979, this case is governed by the LHWCA.

finding that his back injury did not occur in the course of his employment. Cruz claims that on Friday, June 22, 1979, while working at respondent Holland & Lyons Restoration Company's construction area, he felt a "slight tug" in his back as he attempted to slide a security door into place. Cruz states that, as a result, on Sunday, June 24, 1979, he went to the Hospital where he was treated for back pain. Cruz called his supervisor that day and allegedly informed the supervisor that he had been injured on the job.

There is substantial evidence in the record corroborating the ALJ's conclusion that Cruz's back injury did not arise out of or occur in the course of his employment. See Wheatley v. Alder, 407 F.2d 307, 314 (D.C. Cir. 1968) (If supported by substantial evidence, all inferences

drawn by the ALJ from conflicting evidence are entitled to deference and are conclusive.). Cruz's supervisor, who no longer works at Holland & Lyons, recounted that he did not receive any call from Cruz on June 24, 1979. On that date, Cruz's son apparently told the supervisor that Cruz had injured his back over the weekend and that the injury was not job-related. The supervisor's statements are corroborated by Mr. Thomas Pitetti, a former manager at Holland & Lyons. Pitetti stated that he also spoke with Cruz's son who informed him that Cruz's injury was not work-related. The "Employer's First Report of Injury," which was filled out by Pitteti, notes that Cruz's injury occurred over the weekend and was unrelated to his employment. In addition, the record supports the ALJ's finding that Cruz had a

history of back pain prior to June 22, 1979, the cause of which was unrelated to his employment. Because the ALJ's decision is supported by substantial evidence, the Board correctly affirmed the decision to deny disability benefits. See Crum, 738 F.2d at 478 (The Board is "bound to adhere to the ALJ's determination . . . if that conclusion was supported by substantial evidence.").

Finding no error, the petition for review is denied.[2]

[2]. We also reject Cruz's assertions of conspiracy and collusion. Those claims are unsupported and wholly without merit.

U.S. Department of Labor
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 84-182
OWCP No. 40-138507

WILFRED J. CRUZ	)FILED AS PART
Claimant-Petitioner	)OF THE RECORD
v.	) SEP 30 1987
HOLLAND & LYONS	) (date)
RESTORATION COMPANY	)/s/ Linda M.
and	) Meekins
HARTFORD MUTUAL	) Clerk of the
INSURANCE COMPANY	) Board
Employer/Carrier-	) Benefit Review
Respondents	) Board

DECISION and ORDER

Appeal of the Decision and Order of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Wilfred J. Cruz, pro se, Washington, D.C.

Jon M. Studner and Gerald Herz (Friedlander, Sloan & Herz), Washington, D.C., for the employer/carrier.

Before: McGRANERY and DOLDER, Administrative Appeals Judges, and MURRAY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals pro se[1] the Decision and Order (83-DCW-56) of Administrative Law Judge Julius A. Johnson denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. subsection 901 et seq. (1972) as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code subsection 501 et seq. (the Act). We must affirm the findings and conclusions of the administrative law judge which are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. subsection 921(b)(3); O'Keeffee v. Smith, Hinchman & Grylls Associates, Inc.. 380 U.S. 359 (1965).

Claimant, a carpenter for employer, testified that on June 22, 1979, he was replacing a door in a townhouse being renovated in Georgetown. He stated that, as he was attempting to slide the 130-150 pound door into place to prevent vandals from getting into the construction area, the door jammed.

[1]Claimant was represented by an attorney before the administrative law judge.

"Sitting as a temporary Board member by designation of the Secretary. 52 Fed. Reg. 27288. 27291 (1987) (to be codified at 20 C.F.R. subsection 801.201(d))."

Claimant indicated that as he tried to unjam the door, he felt a "slight tug" in his back. He finished replacing the door and left work for the weekend. He testified that when he got home from work, he had to lie down because his back bothered him. The next day, Saturday, he had pain in his back and had to lie down all day. On Sunday, June 24, 1979, claimant stated that he became "just about paralyzed" and went to the hospital, where he was treated for back pain and released the same day. He stated that he called his supervisor, Mr. Mihalick, and told him he had been injured on the job. Zela Henderson, claimant's companion, corroborated his testimony regarding his activities over the weekend, the hospital visit, and the phone call to Mr. Mihalick. Claimant subsequently underwent a decompressive bilateral laminectomy at L3-L5 on July 18, 1979. He filed this claim, seeking temporary total

disability benefits from June 22, 1979 to June 13, 1981 and permanent partial disability benefits from June 14, 1981 and continuing thereafter.

The administrative law judge denied the claim, finding that claimant failed to establish that his alleged back injury arose out of and in the course of his employment. Claimant appeals pro se, contending that the administrative law judge committed numerous errors in admitting certain evidence, in stating the facts of the case, and in considering the evidence of record relevant to the causation issue.

In addition to the testimony of claimant and Ms. Henderon, the record contains the following relevant evidence. Mr. Mihalick, claimant's supervisor, testified that he never received a call from claimant on June 24, 1974 and that claimant's son[2] (who works for employer) told him on Monday, June 25 that claimant had injured his back over the weekend and that his injury was not work related. Mr. Mihalick also stated that there was no need for claimant to close off the work area because it was the entrance to a building where

people were living at the time. Mr. Pitetti, employer's manager, stated that he had been to the job site on the day that claimant was allegedly injured and that the entrance doors, which each weighed only about 60 poounds, had not been removed. The record also contains a series of contemporaneous hospital records from the Veterans Administration Hospital which make no reference to the fact that the alleged back injury was work-related.[3]

[2]Claimant's son did not testify as the hearing. Claimant attached a notarized statement from his son, as well as other documents, in support of his claim. We cannot consider these documents as only the record developed before the administrative law judge may be considered on appeal. Rose v. George A. Fuller Co., 15 BRBS 195 (1982).

[3]Dr. Stern's July 26, 1979 V.A. Hospital record indicated that claimant had been treated for a history of low back pain since June 8, 1979. A letter form the V.A. Hospital to an insurance adjusting compny, however, indicates that the date noted in this hospital record was i incorrect and that hospital personnel had stated that claimant's back problems stemmed from the alleged injury on June 22, 1979.

The section 20(a) presumption, 33 U.S.C. subsection 920(a), applies to the issue of whether claimant's injury was causally related to his employment. Before the Section 20(a) presumption is applicable

however, claimant must establish that he sustained some harm and that working conditions existed or an accident occurred which could have caused the harm. Kelaita v. Triple A Machine Shop, 13 BRB S 326 (1981). Crediting Mr. Mihalick's and Mr. Pitetti's testimony over that of the claimant, the administrative law judge's finding and the administrative law judge committed no reversible error in weighing the conflicting evidence and making credibility determinations. See Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); Sprague v. Director, OWCP, 688 F.2d (1st Cir. 1982). Since claimant has not demonstrated a prima facie element of his claim, the denial of benefits is affirmed.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED,

/s/NANCY S. DOLDER
Administrative Appeals Judge

/s/REGINA C. McGRANERY
Administrative Appeals Judge

/s/FREEMAN C. MURRAY
Administrative Appeals Judge

Dated this 30th
day of September 1987

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
WILFRED J. CRUZ	:	
Claimant	:	
v.	:	CASE NO.
HOLLAND AND LYONS RESTORATION COMPANY	:	83-DCW-56
Employer	:	OWCP NO.
and	:	40-138507
HARTFORD MUTUAL INSURANCE COMPANY	:	
and	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	:	
Party in Interest	:	

PETER C. DePAOLIS, Esquire
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2020 K Street, N.W., Suite 840
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GERALD HERZ, Esquire
JON M. STUDNER, Esqire

Friedlander, Misler,
Friedlander, Sloan & Herz
1101 17th Street, N.W.,
Suite 1205
Washington, D.C. 20036
For the Respondents

Before: JULIUS A. JOHNSON
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This matter involves a claim under the Longshoremen and Harbor Workers' Compensation Act, as amended, 33 U.S.C. subsection 901 et seq. (hereinafter, the "Act"), and extended by District of Columbia Workmen's Compensation Act, 36 D.C. Code subsections 501-504 (1973 Ed.). the claim for compensation is based on an alleged work-related back injury on June 22, 1979 resulting in a temporary total disability for which compensation was paid from that time until June 13, 1981, but, because at an asserted inappropriate rate, the claim is for the differential compensation; after the date payment ceased, this disability claim is for continuing compensation at an asserted appropriate rate. Alternatively, claimant

seeks compensation for permanent partial disability from June 14, 1981, based on a loss of wage-earning capacity. Respondents oppose both claims, the first on the ground that claimant did not have any work-related injury, despite the fact that respondents paid compensation for almost two years, and the second on the ground that claimant, since enrolled in college, has voluntarily withdrawm himself from the labor market and has not sustained any loss of wage-earning capacity as the result of any effects from a work-related injury. Respondents also rely on Section 908(f) of the Act to limit payments of compensation to claimant, should there be any determination of liability.

The hearing was held in Washington, D.C. on February 4, 1983. Respondents submitted the post-hearing deposition of Thomas Pitetti, taken on February 28, 1983 and ow admitted in evidence as Respondents' Exhibit 14.[1/] Apart from respondents' pre-hearing memorandum, the parties also submitted post-hearing briefs and memoranda, the last of which was received May 17, 1983.

FINDINGS OF FACT AND CONCLUSION OF LAW

At the hearing, claimant and Zela Henderon testified on his behalf. Respondents' witnesses were Raymond Mihalick, claimant's immediate supervisor; Thomas Pitetti, and office job site supervisor; Dr. Leo Van Herpe, claimant's physician; a rehabilitation counselor; and two college officials. The primary question is whether an accidental back injury arose out of and in the course of claimant's employment.

Background

The Work Incident and Subsequent Events

Claimant, a carpenter, testified that on Friday, June 22, 1979 he was renovating a Georgetown house at 2909 Q Street, N.W., in the District of columbia. He felt a "slight tug" in his back in putting an exterior wooden door, weighing 130-150 pounds and measuring 8' x 3' x 3/4", back into place after its removal for shortening the entranceway. He experienced this sensation when he was actually trying to remove the door from a jammed, improper position. Claimant stated he did not

1/ Claimant's and Respondents' Exhibits are referred to here as "CX" and "RX", respectively; the transcript and depostion as "T" and "D",

respectively.

give any particular attention to the effect of this effort and finished closind up the residence by nailing a 2" x 4" board behind it. (T. 42-46) He walked several blocks for some fifteen minutes to the Dupont Circle Metro station and rode a subway for about forty-five minutes to get home. Upon his arrival home, claimant began to experience the effects of the "slight tug" in his lower back, and, unable to engage in his usual after work hobby, he fell asleep. (T. 47) the next day, Saturday - a non-work day, claimant had a pain in his back but he stated, "I did not pay it much mind." He engaged in no physical activities that day, spending much of the time lying on a couch. The next day, Sunday, June 24, claimant testified that the pain became so severe that he was "just about paralyzed." Zela Henderson, with whom he lived, called an ambulance and claimant was taken to the Veterans Administration (VA) Hospital. After examination in the emergency room, claimant returned home. He said he remained in bed the rest of that day and that evening called his job superintendent,

Raymond Mihalick, at his home to let him know that he hurt his back on the job (Friday) and wouldn't be able to make it in (Monday)." He then called his son, "Billy," who was also employed by employer and worked on the same Georgetown house with claimant, but was absent ("stranded on the Parkway") when claimant was closing the work site that Friday. Claimant said he advised him of the work to be done on this project which he, claimant, primarily co-ordinated. (T. 40, 49-51, 99-102)

Claimant testified that on Monday and the succeeding days the back pain worsened to such an extent that he had to return to the VA Hospital Thursday, June 28. Following admission he recieved surgery, a decompressive bilateral laminectomy (L3-L5), and after several weeks of recuperation was discharged July 24. (CX-1A) Claimant received out-patient therapy and was prescribed a back brace which claimant states he wears virtually all the time. (T. 106-117) Following four visits for out-patient care, completed on October 18, 1979, claimant next made three visits in 1981 and three in 1982, the last being in

November. (CX-1B)

Claimant admitted to no prior discomfort, medical care or hospitalization relating to his back and no prior problems with his back. He was unaware he had spinal stenosis, the condition for which the surgery was performed. (T. 104-105, 132-134) The claim was prepared June 28, 1979, the day claimant was admitted to the hospital, and claimant received compensation for a temporary total disability from June 22, 1979 until June 13, 1981. (T. 17-19, 117) Disability is asserted since the time of the incident at work, to which claimant did not return.

In January 1980, six months after the work incident, claimant enrolled as a full-time student in electrical engineering at the University of the District of Columbia and participated in a work-study program, supplementing funds received from other grants and public assistance. (T. 89-93; EX-13) Claimant has continued as a full-time student, except for one semester in 1982 when he took less than the required twelve hours.

In his present condition, claimant

states he experiences pain some times from the back of his neck to the back of his leg and whenever bending or stair climbing. He cannot sit without a back support. (T. 122-126)

Zelda Henderson offered testimony supporting claimant's. Ms. Henderson testified that claimant arrived at their apartment Friday evening, June 22, 1979, appearing tired. Along with telling her about other events of the day, he told her about a "pull in his back in handling a door." He washed up, lay on a couch, without taking up his usual hobby in electronics, and fell asleep, still clothed. The next day, Saturday, claimant complained of a backache and headache, and spent much of the day simply lying on a couch. (T. 215-217) That Sunday, June 24, claimant could not move his legs and was taken to the VA Hospital by ambulance. He returned home that evening and called Ray Mihalick, explaining to him that he hurt his back at work moving a door. she stated his condition became increasingly worse in the following days and that Thursday he was admitted to the VA Hospital. (T. 219-222)

That Sunday, June 24, claimant asked her to obtain a Department of Labor claim form (notice of injury). He completed the form, dated June 28, 1979, and she mailed it. (T. 221-223, 229-230; CX-6) (Form filed 7/3/79, admitted as CX-6A) Claimant also received later a form for the examining physician and, at claimant's request, Ms. Henderson gave it to Dr. M. Stern to be filled out. She mailed this form also to the Department. (T. 223-225)

Raymond Mihalick, employer's general superintendent who had hired claimant in April 1979, a couple of months before the work incident, testified that he first learned about claimant's back injury from claimant's son on the Monday morning following the Friday mishap and he stated the son did not say it was a job-related injury. (T.39, 54, 65) Claimant had been given his home telephone number for the purpose of reporting an injury or emergency but claimant never called him at home, or otherwise reported a work injury to him, although the company policy required an injury to be reported within twenty-four hours. Had claimant reported any work

injury to him on June 24, he stated, he would have completed a form immediately for insurance purposes and arranged for claimant to do so as well. (T. 71, 73) Because claimant was in charge of the Georgetown project and Mihalick "was concerned about what to do with the job," he called claimant himself some time during the week of claimant's son's report that Monday and was not apprised of any work injury by claimant.[2/] (T. 63, 65, 67) He mentioned a discussion with claimant about a back injury within a week or two after claimant was "laid up" but nothing was said about a job injury. He did say that before claimant began working for employer, claimant's son told him claimant had back problems. (T. 55-56)

Mr. Mihalick was absolutely positive that he did not receive a call from claimant on Sunday, June 24, as claimant testified, and that claimant's son merely told him the following Monday that claimant had hurt his back. He learned that claimant claimed some injury was related to his work only when he learned later from Tom Pitetti, who handled "paperwork," that some

accident report had been filed, since claimant himself never returned to work for employer. (T. 62-66, 72, 74)

In claimant's absence, the Georgetown work, described as "a small job," was "shut down" on the Monday of the son's report of claimant's injury. Mihalick did not know if work resumed but later employer went out of business. (T. 63, 79). [2/] A transcribed oral statement taken from Mihalick in March 1980 indicates he must have learned about an injury from the son:

> [Mihalick]: . . . I'm not sure of the exact dates but he [claimant] went home on Friday and I don't know that I talked to him on the weekend or whether it was the following week. He said he had hurt himself but there was a remark made. I don't know, it was either by him or by his son. I'm not sure, you know, he's had trouble with his back for years.
>
> [Counsel]: Is that an accurate reflection of what you were told by either Mr. Cruz or his son?
>
> A. By his son. (T.67)

Mihalick stated that in this house renovation there was no particular need to block off an area with the door, as claimant had described, since this was the entrance to the residence in which people were living at the time. (T. 61)

Thomas Pitetti, manager of employer's

restorations department, personally knew claimant and was familiar with the work he was performing on the Q Street property, one of several Georgetown projects. (D. 3) Mihalick was the on-site superintendent and claimant's immediate supervisor who regularly checked claimant's work, handled lay-out and supplies, and provided any other assistance. Mr. Pitetti's office was in the location of the several houses undergoing renovation, including the one on which claimant was working. (D. 4-7) He stated the policy of the employer required all injuries to be reported to the superintendent , and if he were unavailable, to himself at the "home office." He personally became aware that claimant had sustained an injury because he recalled claimant did not come to work on a particular Monday when he was expected and he asked claimant's son, also an employee for employer and one of claimant's helpers, about claimant. He testified that the son told him that claimant had hurt himself over the weekend and that it "was not related to any of our jobs." (D. 27, 33) Thereafter, Pitetti attempted to speak to claimant by

telephone but was unsuccessful in doing so through the number claimant had provided to the company.

Mr. Pitetti stated that claimant did not ever report any injury to him and, as far as he knew, not to Mihalick. (D. 11-12) He further stated that he had been on the particular job site the same day of claimant's alleged injury and the entrance doors, described as split English doors about six feet high and weighing about sixty pounds each, "were not taken off." (D. 26) Although he handled compensation matters for employer, he was unaware that disability compensation had been paid to claimant. He did complete the form, Employer's First Report of Injury or Occupational Illness (LS-202), "[t]his accident was reported to me by Mr. Cruz's son on Monday 6-25-79. His son explained that this injury happened over the week end not on our time." (EX-10)

The Medical Evidence

On Sunday, June 24, 1979, when claimant testified that he was virtually paralyzed from pain, he was examined in the emergency room of the VA Hospital and an x-ray was

taken. The radiographic report by Dr. J. R. Hoffman shows in the section for pertinent clinical history, operations, physical findings, and provisional diagnosis, the following: "Acute onset LBP [low back pain]." (CX-1B, p. 1) Claimant stated he was given a shot and sent home with the advice to return if the pain became worse. When claimant returned that Thursday, June 28, a neurosurgical examination was requested, the notation being that claimant was a 48-year-old carpenter with a three-year history of "recurrent low back pain which was relieved in [the] past by heat. Had onset of pain 6/24 preventing ambulation." (CX-1A, p. 1) A provisional diagnosis of low back pain syndrome was made. Dr. M. Ramos stated in the consultation report section that claimant had symptoms of a possible acute lumbosacral sprain and admitted him for a myelogram and conservative treatment.

The radiographic report of Dr. C. F. Murphy on July 3, 1979 indicated, among other things, that the disc spaces in claimant's back were normal. (CX-1A, p. 2) In a report on July 26, 1976, Dr. Mark

Stern noted "a history of low back pain since the 9th of June 1979" and that "the pain has been getting worse since the 19th of June." (CX-1A, p. 3; EX-1) [3] Dr. Stern requested a lumbar myelogram, which on July 11, 1979 revealed a narrow lumbar canal, and Dr. Stern made a preoperative and operative diagnosis of "spinal stenosis back pain." (CX-1, p. 5) On July 18, Dr. Stern performed a bilateral wide laminectomy for decompression of a narrow lumbarcanalat L3 through S1. (Same, p. 3) Claimant was fitted for a brace and his post-operative coourse was uncomplicated. The myelogram requested by Dr. Stern had also revealed "what appears to be an extradural lesion at the L-5 interspace level," according to the report of Dr. J. R. Hoffman. During or after the surgery, no other reference is made to an extradural lesion at the L5 interspace. (CX-1A, p. 12) The indications for surgery had been only "[c]ontinued low back pain with myelographic evidence of spinal stenosis." (Same, p. 5)

Following discharge, claimant made a number of visits to the VA Hospital as an

outpatiient and eventually saw other doctors. Intial Hospital visits included physical therapy treatments which appeared beneficial. Although claimant apparently experienced some discomfort, this appears to have been attributed to a condition claimant had had for many years, stemming from his youth in New-England and "sitting on ice." Claimant's condition was deemed to warrant no further clinical attention as of October 18, 1979. (CX-1B, p. 33)

3/ This hospital summary as to the dates and past history was the subject of some apparent change at the initiative of claimant's former counsel. (CX-1) See text, pp. 11-12, and particularly note 7 infra.

On June 19, 1980, Dr. Jeff Jacobson of the Hospital department of neurosurgery wrote a "To Whom It May Concern" progress note for claimant, relative to any effort for public assistance, indicating claimant had suffered a "work related injury, resulting in severe low back pain." He stated that "[s]tudies revealed a condition of narrowing in the lumbar spinal canal (neurogenic claudication)" and that

"[t]reatment of this condition included decompressive laminectomy to relieve pressure of the nerve roots." He concluded that as a result of this condition claimant was unable to return to his previous employment as a carpenter. (CX-1D, pp. 40-41) This appears to be the first Hospital report and medical record referring to a work-related injury.

On July 28, 1980, Dr. Maxwell Hurston, a private doctor, examined claimant. (CX-1E, pp. 42-44) Based on the history, he stated that claimant "apparently sustained an acute injury" and chiefly complained of constant pain in the back. His examination revealed that claimant did not appear to be in apparent discomfort. He rose from a chair with some guarding of muscles; he was able to walk on his toes and heels without difficulty. Straight leg raising could be performed to ninety degrees biblaterally without pain. There were no sensory changes or atrophy of either extremity. Forward flexion could bring fingertips to the knees. The x-ray films claimant presented showed no evidence of fracture, dislocation, or other abnormal

condition, and the myelogram showed some evidence of narrowing of the spinal canal in the lumbar area. Dr. Hurston believed that claimant needed an aggressive rehabilitative exercise program to stretch his back muscles and to tighten his abdominal muscles in order that he might be capable of normal activity again. Based on objective limitation of motion, Dr. Hurston believed claimant had a twenty percent permanent partial impairment of the whole body. Claimant could work, in his opinion, if not required to lift more than 15-20 pounds or engage in excessive back bending.

In a Hospital neurosurgery progress note of February 26, 1981, it is noted that claimant's pain was significantly decreased as a result of the operation for lumbar stenosis, as compared to his condition before the operation. Claimant was ble to walk well and for long distances, it was noted. (CX-1, p. 36) A note a month later indicated that claimant had had a "good result" from the operation, except for slight residual low back pain, and that the examination was negative. (Same, p. 35) The last visit to the clinic was on Novem-

ber 18, 1982, when it was simply noted that claimant "came in to have a follow-up on my back." (CX-1B, p. 38) It was observed that claimant was "getting along relatively well but still having back pain." (Same)

Dr. Rida N. Azer examined claimant on June 15, 1981 and diagnosed a post-laminectomy syndrome with residual neurological deficit andintractable pain. (CX-1F, p. 47) Among other things, claimant's examination revealed muscle spasm and pain at the extremes of motion of the lumbar spine, tenderness between L4 and S1. In the straight leg raising test, the movement was thirty degrees with both legs. The x-rays taken of the lower spine showed marked narrowing of the interspace between L5 and S1. Later EMG and nerve conduction studies produced essentially normal results, as reported in a progress note of July 22, 1981. Dr. Azer's last diagnosis on that date was post-laminectomy syndrome and claimant was considered unfit for duties that involved prolonged standing, walking, heaving, lifting, stooping, or any bending. (Same, pp. 45-46)

Claimant was later referred to Dr. Van

Herpe who examined him on April 15, 1982 at the request of claimant's counsel. (CX-1H, pp. 51-52) Dr. Van Herpe reported to counsel that the myelogram he examined revealed that claimant had a spinal stenosis and an extradural defect at L5. Physical examination showed minimal tenderness in the area of his surgery, but little or none in the extremities or the sciatic notch. Straight leg raising was positive for pain and sciatic pain at forty-five degrees bilaterally. Range of motion in the spine was markedly restricted and sensory examination showed no abnormality.

Claimant presented x-rays taken over the past several years which revealed to Dr. Van Herpe a progressive narrowing of L5-S1 of modest degree. The myelogram study showed, in his opinion, an exceedingly small spinal canal. He concluded:

> This gentleman with pre-existing spinal stenosis sustained an injury on the job which apparently herniated a lumbar disc, increasing his symptoms markedly. He has had a very appropriate operation which has been quite helpful, but he continues to have symtoms. Some of the x-rays which accompany him at this time show some progressive narrowing at L5-S1. A spot lateral film obtained in this office also showed degenerative disc disease as well as his pre-existing spinal stenosis which has been dealt

> with by surgery. He is certainly totally disabled for his usual occupation as a carpenter. . . . [H]e is educating himself now to be retrained as an electrical engineer and he seems quite devoted to this project. Utilizing the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, he would be rated as having a twenty-five percent impairment of the body as a whole. (Same, p. 52) */ (Emphasis added)

The testimony of Dr. Van Herpe at the formal hearing bore on his report and other medical evidence, particularly regarding a lesion or herniated disc, and any work - relatedness. (T. 172-203) Called as a Board-certified orthopedic surgeon by respondents and as the sole expert witness in the proceedings, he testified that claimant gave the history at the time of examination of developing the sudden onset of low back pain from lifting a heavy door. After the hospitalization for two weeks and unsuccessful conservative treatment, Dr. Van Herpe observed that the myelogram showed a disc protrusion at L5, S1, and a spinal stenosis, described as a narrowing of the spinal canal from L3 to L5. The surgery performed for the spinal stenosis produced improvement post-operatively but chronic low back pain was reported by claimant. The back support prescribed

appeared to be helpful. Claimant told him that he had had no back pain or leg symptoms whatever until his work accident. (T. 174-175) Dr. Van Herpe testified that the stenosis could be congenital or developmental, and believed that claimant's condition was the former. (T. 177) The symptoms of the condition included a history of intermittent back pain, sometimes quite incapacitating, with radiation into the legs, and a history of spinal claudication, a recurrent onset ofsevere pain and cramps in the calves of the legs based on deficient circulation in the lower extremities. This claudication, or vascular insufficiency, may produce discomfort regardless of activity such as lying down or moving about. In his opinion, the Hospital record with a history of recurrent back pain and an indication that this appeared to be discomfort claimant had had for many years, was consistent with the diagnosis of spinal stenosis. (T. 179) Based on his review of the operative notes, the bilateral laminectomy at L3, L5, performed on claimant July 18, 1979 to correct the congenital spinal stenosis, was neces-

sary apart from any prior trauma. He believed there was no evidence of any acute injury, acute fragmentation of discs, or any pressure. (T. 180-181)

On cross-exmination, Dr. Van Herpe stated that there was no indication from the operative report - which he considered deficient in this respect - what, if any, surgery might have been performed for what was thought to be the herniated disc. (T. 185-186) He indicated that the records of the Hospital and other doctors, such as Drs. A. Rosenblatt, Hurston, Azer, and Daniel Ignacio,[3] were used to form his opinion. (T. 184-185) He stated he still believed claimant had a herniated disc at L5, S1 which was not corrected by the surgery and that over the ensuing years the "disc space . . . has narrowed on down which indicates the disc, indeed, was injured and developed some secondary changes and it's now a degenerative disc at L5, S1." (T. 188) Among other matters related to an "[a]pparently" herniated disc during counsel's examination (T. 184-197), Dr. Van Herpe stated radiating pain into

[3] No reasons are given here for the "disc" diagnosis.

leg would be consistent with this condition which could be brought on by lifting. (T. 192, 195)

Dr. Van Herpe further explained on redirect examination the effect of superimposing a herniated disc on claimant's pre-existing condition:

> If he bulged it slightly, he was narrowing a very narrow space [already] and he would probably get symptoms off the bat of pain down his leg. (T, 202)

Dr. Van Herpe reaffirmed his belief, consistently with a report to respondents' counsel on February 1, 1983, that claimant could perform most any sedentary task that did not involve repeated bending or stooping, climbing or lifting more than fifteen pounds. With these restrictions and the freedom to move about at will, Dr. Van Herpe believed claimant could have returned in December 1979 to light duty tasks of a clerk, dispatcher, cashier or attendant. (T. 202-203; EX-6)

<u>The Purported Change in the VA Hospital Record</u>

In a letter dated January 2, 1980,

claimant's former counsel suggested that Dr. Stern's medical report of July 26, 1979 (CX-1A, p. 3) might contain a typographical error in referring to "a history of low back pain since the 9th of June 1979," inasmuch as claimant claimed he was never injured on June 9 but on June 22, 1979. (CX-2, pp. 53-56; CX-1A, p. 3; EX-1) In addition, counsel stated that the treatment then being rendered to him by the Hospital "for the actual

=/ Dr. Rosenblatt asisted Dr. Stern in Claimant's surgery (CX-1A, p. 5) and wrote a note for claimant (10/11/79) stating claimant should remain "out of his job for another 90 days." (CX-1C) Dr. Ignacio performed EMG and nerve conduction studies for Dr. Azer. (CX-1G)

injuries" received on the latter date "must be connected by the physician of the patient [at the Hospital]." A similar letter dated January 18, 1980 was sent specifically to the assistant administrator of the Hospital. (Same, p. 57) There is no evidence of any response to either letter, which requested expeditious consideration in view of a then upcoming compensation hearing. However, a letter dated June 6, 1980 from the district counsel of the

Veterans Administration in Washington, D.C., to an insurance company indicated, relative to an application for medical benefits and billing, that thte dates in the medical report of Dr. Stern, [6] who was no longer employed by the Hospital, for the inception of claimant's low back pain were in error. The leter of district counsel further stated, "Hospital personnel have stated that the visit of Mr. Cruz's back problem [sic] stemmed from the alleged injury on June 22, 1979." (CX-2, p. 57)[7]

[6] The letter refers only to a "physicain," but the letters of claimant's former counsel make it clear that the concern is the "rather puzzling" Hospital summary of Dr. Stern. (CX-2, pp. 53-56) See note 7, infra.

[7] Pertinent portions of didstrict counsel's letter included the following:

> A summation of information orally received from hospital administration personnel at the VA Medical Center indicates that Mr. Cruz presented himself for treatment on June 24, 1979. He was not admitted for treatment at that time, but was x-rayed. He next presented for treatment [sic] on June 28, 1979 at which time he was brought to the hospital in a wheelchair. He was admitted as a patient and the laminectomy performed.
>
> The discrepan[c]y in the dates indicated in the report as the dates of inception of the back problem were explained as errors by a physi-

> cian no longer with thehospital who was known for callousness in recording information presented from patients upon hospital admissions. Hospital personnel have stated that the visit of Mr. Cruz's back problem [sic] stemmed from the alleged injury on June 22, 1979. [Emphasis added.]

Claimant's principal physician during the hospitalization appears to have been Dr. Stern, who requested the myelogram, performed the surgery (with preparation of pre-operative and operative reports), and dictated the Hospital summary the day before claimant's dicharge July 27, 1979. It does not appear that he was involved at all in admitting procedures, for which Dr. Ramos assumed responsibility. (CX-1A)

College Enrollment and Possible Job Rehabilitation

In December 1980, several months after claimant's initial college enrollment in January, claimant was inerviewed at respondents' request by a rehabilitation counselor, Phillip Bussey, for the purpose of determining his ability to undertake construction work or other work suitable for his condition. (T. 118-121, 234-277) Although claimant stated he did not attempt to find other work after enrolling in col-

lege and participating in the work-study program, he denied telling Mr. Bussey that he was not interested in alternate employment. His purpose in going to college, he explained, was to retrain himself in electrical engineering. (T. 139-140, 143-144) At the time of his enrollment, claimant said that he did not feel capable of gainful employment and did not seek any work before coclllege enrollment (T. 115, 154), but, because employer offered nothing, he felt is necessary to make plans to provide for himself. (T. 154-155, 159) Dr. A. Rosenblatt had advised him in October 1979, a few months after claimant's surgery and several months before his college enrollment, that claimant could do sedentary or clerical work. (T. 155; CX-1C, p. 39)

From respondents' standpoint, Mr. Bussey arranged an interview with claimant through his attorney on December 31, 1980 for the purpose of initiating vocational rehabilitation service. Claimant, then enrolled in the University of the District of Columbia, stated that he considered himself a student and planned to pursue his

studies regardless of the outcome of then pending compensation matters. (EX-4) Mr. Bussey communicated with claimant by letter dated April 9, 1981 and offered his assistance in finding suitable work, based upon his survey of available jobs in the Washington metropolitan area accommodating claimant's education, experience, and medical condition. Mr. Bussey received a telephone message from claimant indicating that any further contact should be made through his attorney.

The transcript of the University shows that claimant has been enrolled since the spring semester 1980 in the college of physical science and engineering, majoring in electrical engineering. (EX-9) A career placement director at the University stated that graduates in this field, regardless of age, could expect, based on job offers to date, and average annual salary of $17,454.

Disposition

Accidental Injury and Causal Connection

The total evidence bearing on the claim for continuing temporary total disability, or permanent partial disability based on

the asserted loss of wage-earning capacity, is focused on the threshold question whether claimant sustained a work-related injury.

The applicable concepts, as shown by the briefs of the parties, are clear. Under Secion 902(10) of the Act, disability means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Claimant's credible testimony alone may constitute sufficient proof of physical harm. See Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, Eller & Co. v. Golden, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Under Section 902(2) of the Act, the term "injury" means, as pertinent here, "accidental injury arising out of and in the course of employment." "Arising . . . in the course of "means the time and place of injury and the activity engaged in when the injury occurred. See 1 A. Larson, Workmen's Compensation Law subsections 6 and 14 (1978). Is there here any causal connection between any disability claimant may have sustained and his employment? An employment injury need not be

the primary factor in a resultant disability for compensation purposes. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1960; Haynes v. W.M.A.T.A., 7 BRBS 891 (1978). If a minor employment injury aggravates, exacerbates, accelerated, contributes to or combines with a previous infirmity, disease, or underlying condition, the resulting disability is compensable. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

In determining whether claimant sustained a work-related injury, claimant's claim that he did is not without serious challenge. Claimant, like any witness generally, is presumed to speak the truth. This presumption is not regarded as conclusive, however, and it may be overcome by contradictory evidence, by the manner in which testimony is rendered, by the character of the testimony, or by evidence pertaining to motives. Where a conflict arises in the testimony in the testimony with respect to a material fact credibility must be weighed and a determination made as to which version to accept as true. In such a determination impartiality of the

witness would be a factor to consider, as much as the inherent reasonableness and probability of the account itself. While much here bespeaks the high intelligence and conviction of the claimant, his testimony alone in this matter is insufficient to prove the elements of the claim.

DUE TO THE "LENGTHINESS" OF THIS TEXT AND "DEADLINE" CONSIDERATIONS, -- FOR SUBMITTING WRIT OF CERTIORARI -- I, WILFRED J. CRUZ, SR., PRO SE PETITIONER HAVE EXCLUDED PAGES 15 TO 21 OF US/DOL ADM. LAW JUDGE ORDER . See Record of Same.

ORDER

The claim for temporary total disability and permanent partial disability must be, and is hereby, denied.

/s/ JULIUS A. JOHNSON
Administrative Law Judge

Dated: DEC 27 1983
Washington, D.C.
JAJ/paw

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1645

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

WILFRED J. CRUZ, SR.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
and
HOLLAND & LYONS RESTORATION COMPANY
and
HARFORD MUTUAL INSURANCE COMPANY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS HOLLAND & LYONS RESTORATION COMPANYAND HARFORD MUTUAL INSURANCE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Administrative Law Judge's decision that the claimant failed to establish that he sustained a back injury arising out and in the course of his employment is supported by substantial evidence and is in accordance with the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. 901 et seq.

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Marcus v. Director, OWCP, 548 F.2nd 1044 (1049) (D.C. Cir. 1976) 3

Statutes and regulations:

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 901 et seq. 3

D.C. Code Annotated 36-301 et seq. 3

No. 88-1645

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

WILFRED J. CRUZ, SR.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
and
HOLLAND & LYONS RESTORATION COMPANY
and
HARFORD MUTUAL INSURANCE COMPANY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS HOLLAND & LYONS RESTORATION COMPANYAND HARFORD MUTUAL INSURANCE COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 7-13) is unreported, as is the Court of Appeals order denying Petitioner's Motion for Rehearing En Banc (Pet. App. 5-6) and the order denying Petitioner's Petition for Rehearing (Pet. App. 3). The decision and order of the Benefits Review Board (Pet. App. 14-20) is also unreported, as is the decision and order of the Administrative Law Judge (Pet. App. 21).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 7-13) was entered on October 12, 1988. The orders denying the Petition for Rehearing and Petition for Rehearing En Banc (Pet. App. 3-6) were filed on December 29, 1988. Petition for Writ of Certiorari was filed on March 29, 1989. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The only issue in this matter concerns whether the decision and order of the Administrative Law Judge finding that the claimant did not sustain an injury arising out of and in the course of his employment is supported by substantial evidence and in accordance with law.

Claimant claimed that on Friday, June 22, 1979, while working for Respondent Holland & Lyons Restoration Company at a construction area, he injured his back as he attempted to slide a security door into place. Claimant alleges that as a result, on June 24, 1979, he went to the hospital where he was treated for back pain. Claimant stated that he telephoned his supervisor that day and allegedly informed the supervisor of the on-the-job injury.

The Administrative Law Judge found that the claimant did not sustain a back injury arising out of and in the course of employment as the claimant alleged. The Administrative Law Judge relied upon the testimony of the claimant's supervisor to the effect that claimant never telephoned him on June 24, 1979. The Administrative Law Judge also relied on the supervisor's testimony that claimant's son told him on Monday, June 25, 1979, that claimant had injured his back over the weekend and that the injury was not work-related. These statements were corroborated by statements of employer's manager that claimant's son had also informed him that the claimant's injury was not work-related. The employer's first report of injury, moreover, indicated that the injury had occurred over the weekend unrelated to employment. The record reveals further that the claimant had a history of back pain prior to June 22, 1979 unrelated to his employment.

Claimant appealed the Administrative Law Judge's denial of benefits to the Benefits Review Board (BRB). The BRB affirmed the Administrative Law Judge's decision, finding it to be supported by substantial evidence.

Claimant again appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The court noted that because the Administrative Law Judge's decision was supported by substantial evidence, the BRB correctly affirmed that decision to deny disability benefits.

ARGUMENT

The Court of Appeals' unpublished decision is correct and does not conflict with any decision of this court or another court of appeals. In spite of Petitioner's contentions to the contrary, the only issue legitimately raised by Petitioner challenges the factual findings made by the Administrative Law Judge which were affirmed by the BRB and the Court of Appeals. There is no dispute that under the Longshoremen's and Harbor Worker's Compensation Act, the BRB is bound to regard the Administrative Law Judge's findings of fact as conclusive if supported by substantial evidence on the record as a whole. 33 U.S.C. 921(b)(3). See *Stevenson v. Linens of the Week*, 688 F.2nd 93, 96-97 (D.C. Cir. 1982). The Court of Appeals is charged with ascertaining (1) whether the Board adhered to the applicable scope of review, (2) whether the Board committed any errors of law, and (3) whether the Administrative Law Judge's findings are supported by substantial evidence on the record considered as a whole. *Crum v. General Adjustment Bureau*, 738 F.2nd 474, 477 (D.C. Cir. 1984); *Marcus v. Director, OWCP*, 548 F.2nd 1044, 1049 (D.C. Cir. 1976).

In the instant case, the Administrative Law Judge simply found that the claimant did not sustain the injury alleged at work. The BRB affirmed this based upon the evidence of record, as did the Court of Appeals.

While the claimant has attempted to expand this simple factual determination into a multitude of constitutional questions, the simple facts of this case show that this is merely a case where

the claimant is unhappy with the factual findings made by the Administrative Law Judge.

Review of this matter is, therefore, plainly unwarranted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRIEDLANDER, MISLER, FRIEDLANDER,SLOAN & HERZ

Gerald Herz,
Robert C. Baker, Jr.